Supreme Court, U.S.
FILED

No. 98-1917 JUN 1 1999

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT J. NUSSBECK,

Petitioner,

v.

PATRICIA J. NUSSBECK,

Respondent.

On Petition For Writ Of Certiorari To The Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

HERBERT WADE DELANEY, JR.*
HERBERT W. DELANEY, JR., P.C.
**Counsel of Record*
THEMIA E. SANDVEN
THEMIA E. SANDVEN, P.C.
50 South Steele Street, Suite 660
Denver, Colorado 80209
Telephone: (303) 329-8614
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

51PP

QUESTIONS PRESENTED

I. Whether the conviction and imprisonment of a person for punitive contempt constitutes the unconstitutional retroactive application of a judicial decision in violation of the due process guarantees of the Fourteenth Amendment when the state supreme court overruled its appellate court's longstanding prohibition against the use of contempt against a party for failure to pay a money judgment at law, including a money judgment for past-due child support.

II. Whether the conviction of a person for punitive contempt violates the due process guarantees of the Fourteenth Amendment when the court below had no evidence of an ability to pay.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 1

Summary of Argument 5

Argument:

I. THE CONVICTION AND IMPRISONMENT OF A PERSON FOR PUNITIVE CONTEMPT CONSTITUTES THE UNCONSTITUTIONAL RETROACTIVE APPLICATION OF LAW IN VIOLATION OF THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT WHEN THE STATE SUPREME COURT OVERRULED ITS APPELLATE COURT'S LONG-STANDING PROHIBITION AGAINST THE IMPRISONMENT OF A PARTY FOR FAILURE TO PAY A MONEY JUDGMENT AT LAW, INCLUDING A MONEY JUDGMENT FOR PAST-DUE CHILD SUPPORT 6

II. THE CONVICTION OF A PERSON FOR PUNITIVE CONTEMPT VIOLATES THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT WHEN THE COURT BELOW HAD NO EVIDENCE OF AN ABILITY TO PAY 14

Conclusion 16

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Bloom v. Illinois, 391 U.S. 194 (1968) 10

Bouie v. City of Columbia, 378 U.S. 347 (1964) 8, 11, 12, 13

Cummins v. Missouri, 71 U.S. 277 (1866) 9

Dobbert v. Florida, 432 U.S. 282 (1977) 9

Gompers v. Buck's Stove and Range Company, 221 U.S. 418 (1911) 10, 11, 13

Hebert v. State of Louisiana, 272 U.S. 312 (1926) 8

Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624 (1988) 10, 11, 14

In Re: Marriage of Nussbeck, 949 P.2d 73 (Colo. App. 1997) 1

In Re: Marriage of Woodrum, 618 P.2d 732 (Colo. App. 1980) ..... *passim*

International Union, United Mine Workers of America v. Bagwell, 512 U.S. 321 (1994) 9, 10

Lindsey v. State of Washington, 301 U.S. 397 (1937) 9

Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982) 14

Marks v. U.S., 430 U.S. 188 (1977) 8

Weaver v. Graham, 450 U.S. 24 (1981) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

United States Constitution

Fourteenth Amendment, Section 1 (Due Process Clause)..... *passim*

MISCELLANEOUS

C. Antieau & W. Rich *Modern Constitutional Law* West 2d ed. 1997, at 445.....8, 9

Colorado Rules of Civil Procedure, Rule 107 .....2, 11

OPINIONS BELOW

The opinion of the Colorado Supreme Court is not yet reported. It is reprinted in the Appendix to this petition for certiorari beginning at App. 1. The opinion of the Colorado Court of Appeals is reported at 949 P.2d 73, *In Re: Marriage of Nussbeck* (Colo. App. 1997), and is reprinted in the Appendix beginning at App. 21. The opinions of the District Court judge and the District Court magistrate are not reported. These opinions are reprinted in the Appendix to this Petition for Certiorari, and begin at App. 30, and App. 31, respectively.

JURISDICTION

The Colorado Supreme Court issued its opinion on March 1, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257. This petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution states:

> [No state shall] deprive any person of life, liberty or property without due process of law. . . .

STATEMENT OF THE CASE

This case arises out of two contempt proceedings commenced by petitioner's former wife in the Colorado district court pursuant to two verified motions, one

for remedial contempt and one for punitive contempt. App. 4.

Both parties appeared with counsel before the trial court on the contempt citations on October 4, 1995. At that time the petitioner was advised only of his right to testify respecting the punitive contempt, pursuant to C.R.C.P. Rule 107. Because of the uncertainty of the court and counsel, respecting interpretation of recent amendments to Rule 107, the hearing on the contempt citations was again continued.

On November 21, 1995, both parties appeared with counsel before the court for trial on both contempt citations. The respondent testified on direct examination that the petitioner had failed to pay the orders and judgments, as she alleged in the Verified Motion for Punitive Contempt Citation and the Verified Motion for Remedial Contempt Citation which she had filed with the court. On cross-examination, respondent acknowledged that approximately $5,000 had been obtained from the petitioner by garnishment. Respondent's counsel then attempted to call the petitioner for cross-examination. At that point, the court advised the petitioner of his right to testify or to decline to testify. The court further advised respondent that if petitioner made a *prima facie* showing of contempt, respondent had the obligation to refute the allegations and show that he was not in contempt. Petitioner declined to testify. No further evidences was presented by either party.

The magistrate then made findings, and imposed both remedial and punitive contempt sanctions. The remedial sanction was that the petitioner was to be jailed

until the arrears that accrued since entry of the October 1990 judgment of about twenty thousand dollars ($20,000) were paid. The punitive sanction was "90 days straight jail time." App. 31.

Petitioner's counsel then requested a stay of execution on both the remedial and punitive contempt sanctions, in order to pursue an appeal. The court granted the request respecting the punitive sanction, but denied it as to the remedial. Petitioner was taken immediately to the Jefferson County jail. He was released from jail the following day when his counsel tendered to the court the monies due to purge the remedial contempt citation.

Petitioner filed a Motion to Review Order of Magistrate with the District Court Judge. The motion was denied. App. 30.

Petitioner then filed for appeal to the Colorado Court of Appeals. A stay of execution respecting the punitive sanction was granted by the Jefferson County District Court pending appeal.

The Colorado Court of Appeals affirmed the remedial contempt ruling and reversed the District Court on the punitive contempt conviction. App. 27-29. The Court of Appeals held as follows:

> The husband also argues that the court could not impose punitive sanctions upon him for his failure to pay the October 1990 judgment. We agree.
>
> The wife's second motion and affidavit sought to have the husband held in punitive contempt *based solely upon his failure to pay the October 1990*

> *judgment*; those moving papers made no reference to the husband's failure to comply with the underlying April 1987 order. *Likewise, the magistrate's finding of punitive contempt was founded solely on the husband's failure to pay that judgment and not on his violation of some other court order.* We conclude, however, that the failure to pay a money judgment, such as that involved here, cannot provide the basis for the imposition of either remedial or punitive contempt sanctions.
>
> Because the wife chose to have a judgment at law entered for the pre-October 1990 arrearages, she cannot now seek a remedial contempt order to compel their payment. The entry of a judgment at law and the prosecution of a remedial contempt citation are alternative, not duplicative, remedies. *In re Marriage of Woodrum*, 618 P.2d 732 (Colo. App. 1980).
>
> Further, while the division in *Woodrum* suggested, in dictum, that there might be some circumstances in which punitive contempt sanctions might be imposed after a judgment has entered, we are convinced that, even if this be accurate, such sanctions must be based upon a violation of the underlying order requiring payment and not, as here, upon the failure to pay the judgment.
>
> . . .
>
> App. 27-28. (Emphasis added.)

The respondent sought review by the certiorari to the Colorado Supreme Court which was granted. The Colorado Supreme Court reversed the decision of the Court of Appeals, and overruled the longstanding law set forth in the earlier case of *In Re: The Marriage of Woodrum*, 618 P.2d

732 (Colo. App. 1980), to wit, that the willful failure to pay a money judgment for child support arrears cannot be the basis for a finding of contempt of court.

SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment prohibits the retroactive application of a judicial decision which would impose punishment for an act which was not punishable at the time the act was committed. The ban against retroactive application is designed to uphold the most basic tenant of the due process guarantees, the right to fair notice. In the case at bar, the Colorado Supreme Court overruled its appellate court's longstanding rule that contempt cannot lie for failure to pay a money judgment at law. The retroactive application of the Colorado Supreme Court's holding to this petitioner constitutes the prohibited retroactive application of a judicial decision because the petitioner's failure to pay occurred *before* the effective date of the Supreme Court's March 1, 1999 opinion, and because the Colorado Supreme Court's opinion inflicts punishment which was not available under longstanding Colorado law. Thus the Colorado Supreme Court's decision is in error as applied to this petitioner because it failed to put persons on fair notice of the penalties which the government may impose on those who violate court orders.

Moreover, the trial court's conviction of the petitioner for punitive contempt constitutes a conviction without due process of law in violation because the trial

court had no evidence presented to it upon which to find that the petitioner had the ability to pay.

Petitioner respectfully therefor submits that this petition for certiorari should be granted and the case reversed.

ARGUMENT

I. THE CONVICTION AND IMPRISONMENT OF A PERSON FOR PUNITIVE CONTEMPT CONSTITUTES THE UNCONSTITUTIONAL RETROACTIVE APPLICATION OF LAW IN VIOLATION OF THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT WHEN THE STATE SUPREME COURT OVERRULED ITS APPELLATE COURT'S LONGSTANDING PROHIBITION AGAINST THE IMPRISONMENT OF A PARTY FOR FAILURE TO PAY A MONEY JUDGMENT AT LAW, INCLUDING A MONEY JUDGMENT FOR PAST-DUE CHILD SUPPORT.

The Colorado Court of Appeals correctly noted that the punitive contempt conviction of the petitioner entered as a result of the petitioner's failure to pay a judgment entered against him in October of 1990 could not be the basis for a contempt citation under the case of *In Re: The Marriage of Woodrum*, 618 P.2d 732, 735 (Colo. App. 1980). App. 27-28. The Colorado Court of Appeals correctly noted that the *Woodrum* case required reversal of the lower court's punitive contempt conviction.

The Colorado Supreme Court reversed the Court of Appeals and held as follows:

> We granted certiorari due to the importance of the Court of Appeals' holding, potentially limiting the ability of the trial courts to enforce orders that result in a judgment in dissolution proceedings. We now reverse. . . .
>
> The second question upon which we granted certiorari was whether *In Re: Marriage of Woodrum*, 618 P.2d 732 (Colo. App. 1980) must be overruled. To the extent it conflicts with our judgment today, it is. . . . *Woodrum* states that "entry of a judgment for past-due support payment is an exclusive remedy; such judgments and remedial contempt orders are alternative, not cumulative, remedies." *Woodrum*, 618 P.2d at 735. By our judgment today we disapprove of that holding. The court of appeals, applying this language, erred when it held that the failure to pay a money judgment entered pursuant to [the Colorado Dissolution of Marriage Act], bars a court from imposing either remedial or punitive contempt sanctions. While we do not question the conclusion that a money judgment at law is not an order to pay, but is simply a declaration that one party is indebted to another in a specific amount, we disagree however with the Court of Appeals' holding that "under these facts, because wife chose to have a judgment at law entered for the arrearages she cannot now seek a contempt order to compel payment. . . . Accordingly, we do not agree with that portion of the court of appeals' opinion. . . . To the extent that *Woodrum* can be read to state otherwise, we disapprove of *Woodrum*.
>
> App. 2; 18-19.

Petitioner raised several substantive and due process arguments in the Colorado Court of Appeals and in the

Colorado Supreme Court. In his Colorado Supreme Court Answer Brief petitioner relied upon and objected to the overruling of the longstanding *Woodrum* case. Petitioner respectfully submits that this Court should grant certiorari on this important question of federal law.

The Colorado Supreme Court's imposition of a retroactive punitive sanction against the petitioner violated the petitioner's due process rights under the Due Process Clause of the Fourteenth Amendment. The Fourteenth Amendment obliges the states to employ fundamental concepts of fairness in the criminal justice process. *Hebert v. State of Louisiana*, 272 U.S. 312, 316 (1926). The Due Process Clause prohibits the states, including its judiciary, from the application or interpretation of a criminal statute in a retroactive manner so as to criminalize conduct retroactively. *Bouie v. City of Columbia*, 378 U.S. 347, 353-55 (1964); *Marks v. U.S.*, 430 U.S. 188 (1977) (ruling that a United States Supreme Court decision should not be applied retroactively because it would impose criminal liability for violation of obscenity statutes that was previously protected under prior law).

Professors Antieau and Rich in their treatise, *Modern Constitutional Law*, write as follows:

> The ex post facto ban is limited to legislation. Consequently, it does not directly forbid judicial retroactivity or changes in judgment law. The Due Process Clause does, however, apply to limit judicial retroactivity. Judicial interpretation of a criminal statute cannot be retroactively reversed so as to make acts criminal which were legal when committed under the preexisting interpretation of the statute. As explained by the

> Supreme Court, "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law. . . . [T]he effect is to deprive [the defendant] of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime."
>
> C. Antieau & W. Rich, *Modern Constitutional Law*, at 445, West 2d ed. 1997. (Citations and footnotes omitted.)[1]

The imposition of a punitive contempt sentence is a criminal proceeding entitled to the full panoply of rights encompassed by the Due Process Clause. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S.

---

[1] The constitutional proscriptions set forth in Article I, Section 9, Clause 3, and Article I, Section 10, against ex post facto legislation applies to both the United States Congress and the state legislatures. *See, Cummins v. Missouri*, 71 U.S. 277 (1866). When applying an ex post facto challenge to a criminal or penal statute two critical elements must be present. *Weaver v. Graham*, 450 U.S. 24 (1981). The two critical elements for a criminal statute or ruling to be struck down as an ex post facto law are: 1) it must be retrospective, that is it must apply to events occurring before its enactment; and 2) it must disadvantage the offender affected by it. *Id.* at 29. In other words, the law must apply to events occurring before its enactment and it must disadvantage the offender affected by it. *Lindsey v. State of Washington*, 301 U.S. 397 (1937).

The proscription against ex post facto legislation or application of rulings arose out of the constitutional framers' interest in protecting persons from laws that failed to give "fair warning of their effect" in order that they may rely on the meaning and the extent of statutes until they have been formally and explicitly revised. *Weaver* at 28-29, citing *Dobbert v. Florida*, 432 U.S. 282 (1977).

321 (1994); *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624 (1988).[2]

The Supreme Court in *International Union v. Bagwell*, 512 U.S. 824, noted that "[C]riminal contempt is a crime in the ordinary sense," citing *Bloom v. Illinois*, 391 U.S. 194, 201 (1968), and noted, "criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings, including double jeopardy, right to notice of the charges against him, assistance of counsel, and the right to a jury trial for imprisonment of more than six months." *Bagwell*, 512 U.S. 824 at 826-827.

In a close vote of the Supreme Court in 1988, this court held that a California statute allowing a presumption of ability to pay unconstitutionally reduced the state's burden of proof in a criminal contempt proceeding and remanded to the state court for determination as to whether the proceeding was criminal or remedial in nature. *Hicks*, 485 U.S. 624 at 640-641. Both the majority and minority opinions agreed, however, on the principles

---

[2] The United States Supreme Court has, beginning with the seminal case of *Gompers v. Buck's Stove and Range Company*, 221 U.S. 418 (1911), made a clear distinction between punitive and remedial contempt. The court distinguishes between remedial contempt in which the defendant may purge the contempt by obeying the court order, and criminal punitive contempt which is imposed to punish by fine or imprisonment disobedience to orders of the court in order to vindicate the authority of the court. *Id.* at 499. In this case, the Colorado Supreme Court, as well as the Court of Appeals, agreed that a punitive criminal contempt sanction was at issue on appeal.

enunciated by Justice O'Connor for the dissent, as follows:

> An analogous distinction can be drawn between types of sentences of incarceration. Commitment to jail or prison for a fixed term usually operates as a punitive sanction because it confers no advantage on the other party. *Gompers, supra,* 221 U.S. at 449 . . . But if a contemnor is incarcerated until he or she complies with a court order, the sanction is civil. Although the imprisonment does not compensate the adverse party directly, it is designed to obtain compliance with a court order made in that party's favor.
>
> *Hicks,* 485 U.S. 624 at 647.

In this case, petitioner was charged and convicted of punitive contempt, and was entitled to the protections of the Due Process Clause of the Fourteenth Amendment. Thus certiorari should be granted on this important issue in order to redress the due process violation.

The Supreme Court of Colorado's revised interpretation of Rule 107 of the Colorado Rule of Civil Procedure Rule 107, applied retroactively to this petitioner, violated the Due Process Clause of the Fourteenth Amendment in this criminal contempt proceeding. In *Bouie v. City of Columbia,* 378 U.S. 347 (1964), the Supreme Court held that the South Carolina Supreme Court's interpretation of a 1961 trespass statute violated the due process rights of the defendants. The defendants were engaging in a "sit-in" in a lunch counter booth when they were arrested for trespass. The South Carolina Supreme Court ruled that its 1961 construction of a statute prohibiting entry on lands of another also encompassed the act of prohibiting one

from remaining on a premises after being asked to leave. The Supreme Court held that the retroactive application of this ruling violated the due process guarantees of the minority defendants. Justice Brennan writing for the majority overturned the conviction on the basis that the conviction violated "the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Bouie*, 378 U.S. at 350. The Court stated:

> The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this court . . . There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language . . . Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. 1, § 10, of the Constitution forbids . . . If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."
>
> 378 U.S. at 351, 352, 353-354.

The majority opinion in *Bouie* further held:

> When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of

> law "in its primary sense of an opportunity to be heard and to defend [his] substantive right."
>
> 378 U.S. at 354.

In the case at bar, the longstanding ruling of *Woodrum* that contempt cannot lie for the failure to pay a money judgment, was overturned by the Colorado Supreme Court, and petitioner's conduct, *i.e.* his failure to pay, which previously was not contemptable under *Woodrum*, became criminal by virtue of the Supreme Court's overruling of *Woodrum*. This is the very essence of unfairness which the United States Supreme Court has struck down consistently beginning with *Gompers*, 221 U.S. 418 (1911).

Petitioner Nussbeck had no notice, prior to Colorado Supreme Court's ruling on March 1, 1999, that the *Woodrum* ruling was not good law in the State of Colorado. Indeed, the Colorado Court of Appeals correctly held that the case of *Woodrum* required the overruling of the magistrate's finding of punitive contempt.

The Colorado Supreme Court understandably chose to support its trial courts' efforts in punishing persons who fail to pay child support. Clearly, the Colorado Supreme Court had the jurisdiction and authority to overrule *Woodrum*. However, the court did not provide the petitioner with "fair warning" of a change in the law and its effect.

Moreover, it is clear that the Colorado Supreme Court's ruling disadvantaged the petitioner affected by the ruling. Prior to the Colorado Supreme Court's ruling, *Woodrum* prohibited a finding of contempt for failure to pay a money judgment at law. After the Colorado

Supreme Court's ruling, petitioner is now subject to the court's contempt conviction and ninety-day jail sentence. Thus, the Colorado Supreme Court's ruling had the real and actual affect of disadvantaging this petitioner.

In sum, the Colorado Supreme Court's decision in the case below constituted the unconstitutional retroactive application of a judicial decision. Petitioner prays that this court grant this Petition for Writ of Certiorari, and reverse the decision of the Colorado Supreme Court.

II. THE CONVICTION OF A PERSON FOR PUNITIVE CONTEMPT VIOLATES THE DUE PROCESS GUARANTEES OF THE FOURTEENTH AMENDMENT WHEN THE COURT BELOW HAD NO EVIDENCE OF AN ABILITY TO PAY.

Punitive contempt cannot be presumed. *See, Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624 (1988); *Lobb v. Hodges*, 641 P.2d 310 (Colo. App. 1982). "[T]he requirement that there be an explicit finding by the trial court that the contemnor's conduct offends the dignity of the court is grounded in constitutional principles. 'Any legal proceeding in which an individual may be imprisoned, or deprived of his property in a penal sense . . . should be treated as a criminal prosecution as contemplated by the sixth amendment.' " *Lobb v. Hodges*, 641 P.2d 310 at 311 (Colo. App. 1982). (Citations omitted.)

Respondent's Verified Motion for Punitive Contempt in this matter alleged petitioner's willful failure to pay the aforementioned judgment. There was no allegation as to what constitutes wilfulness on the part of the petitioner. Respondent only proved at hearing that there was

a 1990 judgment that the amount thereof was correct, and that petitioner had not paid all of it. This proof did not constitute proof beyond a reasonable doubt of an ability to pay and was not sufficient to sustain punitive contempt. Thus, the magistrate's findings were not based upon sufficient evidence to sustain a punitive contempt conviction.

Further, the mere existence of an unpaid judgment does not constitute the requisite "misbehavior" and "offense" to the authority and dignity of the court. The Colorado Court of Appeals correctly noted:

> [A] money judgment at law is not an order to pay; it is simply a declaration that one party is indebted to another in a specific amount, leaving the judgment creditor to pursue the remedies provided by law. *San Luis Power & Water Co. v. Trujillo*, 93 Colo. 385, 26 P.2d 537 (1933). *See In re Marriage of Woodrum, supra.*
>
> To be sure, in the course of execution proceedings upon such a judgment a court may enter ancillary orders directing that the judgment debtor take certain actions, including the transfer of property. *See, e.g.*, C.R.C.P. 69(g). A willful failure to comply with such an order could furnish the predicate for the imposition of remedial or punitive sanctions. *Cf. Urbancich v. Mayberry*, 124 Colo. 311, 236 P.2d 535 (1951). However, no such order in aid of execution was entered here.
>
> We conclude, therefore, that, because both the wife's motion and affidavit and the magistrate's finding of contempt relied solely upon the husband's failure to pay the October 1990 judgment as the basis for the punitive contempt sanctions, the resulting order of contempt

> and the punitive sanctions imposed therefor must be reversed. . . .

App. 28-29.

The only evidence presented against the petitioner was that a judgment was rendered in 1990 for maintenance and child support arrearages which judgment had not been paid in full. Respondent did not present any evidence of petitioner's present ability to pay at the November 1995 hearing, such as bank records, earnings records, spending records, credit card statements, or witness observations of petitioner's lifestyle or income. Respondent's evidence did not constitute, as a matter of law, proof beyond a reasonable doubt. Thus the petitioner prays that this Court grant certiorari to review this important federal issue.

CONCLUSION

Petitioner respectfully submits that the ruling of the Colorado Supreme Court in this case should be reversed and remanded on the basis that it violates the Fourteenth Amendment prohibition against conviction of punitive contempt without due process of law.

Respectfully submitted,

HERBERT WADE DELANEY, JR.*
HERBERT W. DELANEY, JR., P.C.
*Counsel of Record
THEMIA E. SANDVEN
THEMIA E. SANDVEN, P.C.
50 South Steele Street, Suite 660
Denver, Colorado 80209
Telephone: (303) 329-8614
Attorneys for Petitioner

SUPREME COURT, STATE OF COLORADO
No. 97SC540 March 1, 1999

In re the Marriage of:

PATRICIA J. NUSSBECK, Petitioner,

and

ROBERT J. NUSSBECK, Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT REVERSED AND CASE REMANDED WITH INSTRUCTIONS

McGuane and Hogan, LLP
Frank L. McGuane, Jr.
Denver, Colorado

Attorneys for Petitioner

Thomas H. May
Denver, Colorado
Themia E. Sandven
Denver, Colorado

Attorneys for Respondent.

JUSTICE SCOTT delivered the Opinion of the Court

We granted certiorari in this dissolution of marriage case to decide whether a trial court may enforce its order requiring payment of maintenance and child support through contempt proceedings after a money judgment

has been entered on amounts not paid.[1] The court of appeals held that it could not and reversed the trial court's punitive contempt order reasoning that "[t]he entry of a judgment at law and the prosecution of a . . . contempt citation are alternative, not duplicative, remedies." *In re Marriage of Nussbeck*, 949 P.2d 73, 77 (Colo.App.1997). We review the judgment of the court of appeals because of the importance of the issues raised to our trial judges, and now reverse.

I.

A.

This matter in dispute arose out of a lengthy dissolution proceeding between Patricia J. Nussbeck (wife) and Robert J. Nussbeck (husband). After agreeing that their marriage of approximately nineteen years was "irretrievably broken," wife and husband filed a joint-stipulation to temporary orders regarding custody of their daughter and amounts to be paid by husband for child support and maintenance.

---

[1] Patricia J. Nussbeck petitioned this court seeking certiorari and raised the following issues for our review:

1) Whether the court of appeals erred in concluding and ordering that Husband could not be found in contempt of court and be subjected to punitive sanctions for failure to pay child support and maintenance arrearages which had been reduced to written judgment.

2) Whether this court should overrule the rule announced in *In re Marriage of Woodrum*, 618 P.2d 732 (Colo.App.1980) that remedial contempt for nonpayment of child support or maintenance may not be pursued once written judgment for child support or maintenance arrearages is obtained.

On May 4, 1987, the stipulation, executed by wife, husband, and their attorneys, was filed with the trial court. Under the stipulation, it was agreed that the parties were to have joint custody of their minor daughter, that wife and the minor daughter were to have use of the family home, and that husband would continue to make monthly mortgage payments. It is undisputed that the stipulation became temporary orders of the trial court (temporary orders). By the temporary orders, husband was to pay temporary maintenance and child support to wife in the amount of $330 per month.

When husband failed to make payments contemplated by the temporary orders, wife filed her "Verified Motion for Judgment for Family Support." On October 10, 1990, the trial court entered a judgment against husband (the 1990 Judgment) for amounts due in accordance with the temporary orders. The 1990 Judgment was in the amount of $13,200, plus interest.

Several months later, the trial court entered its order and decree of dissolution, dissolving the Nussbecks' marriage. However, due to pending bankruptcy proceedings in federal court and related complications involving finances, the court deferred issuing its permanent orders regarding the division of property, maintenance, payment of debts, and attorney fees until a later date.

On May 17, 1994, the trial court entered permanent orders (the 1994 Permanent Order). Under the 1994 Permanent Order, the trial court entered findings that husband had "refused to pay child support and maintenance" under the 1990 Judgment, "together with interest totaling $19,114.53." The trial court also found

that husband owed additional arrearages that accumulated after the 1990 Judgment until May 1993, totaling $11,753.24. The 1994 Permanent Order directed the husband to pay the $11,753.24 "on a forthwith basis."[2] However, while husband made some payments, he failed to make all the payments under the temporary orders as set forth in the 1990 Judgment and the 1994 Permanent Order.

In July 1995, about 15 months after the 1994 Permanent Order, wife filed two motions seeking to have husband held in contempt. In one motion, wife sought remedial sanctions based upon husband's refusal to pay sums due under the 1994 Permanent Order for the arrearages that had accumulated after the 1990 Judgment. The trial court granted this motion, ruling that husband's action of refusing to pay "forthwith" the $11,753.24 was a sufficient basis to hold him in contempt. This remedial contempt ruling, however, is not at issue before us.

Under the other motion, Verified Motion for Punitive Contempt Citation, wife sought punitive sanctions and attorney fees for amounts not paid pursuant to the temporary orders and set forth under the 1990 Judgment. Wife's punitive contempt motion was based upon the trial court's earlier finding that husband *"refused to pay child support"* (emphasis added) and that husband acted in "willful violation of existing orders of the court" concerning the 1990 Judgment.

---

[2] The trial court also found that husband had sold a ring that was the personal property of wife, and it directed husband to pay wife the sum of $8000, representing the ring's market value, within 60 days.

On November 21, 1995, after a hearing before a magistrate, husband was found guilty of contempt under both motions. Under the punitive contempt motion, the magistrate found that "orders . . . were entered," and that the "orders were known to [husband]." Taking notice of the court's own file, the magistrate further ruled "that these orders for child support are judgments when they are not paid. And there was nonpayment." The magistrate found that husband "had ample opportunity to follow through with the orders of the court," and that husband's "attempts are and have been to dodge the order, to not pay, to make it difficult for the [wife] to collect child support."

In light of these findings, the magistrate concluded that a "punitive sanction is appropriate." As a consequence, husband was sentenced to "ninety days straight jail time . . . to vindicate the dignity . . . of the Court for [husband's] continual obstruction of the order of the Court, nonpayment of child support, and nonpayment of maintenance . . . and [a] previous contempt that was entered when you were ordered to pay, and wherein the Court made findings of, essentially, the same findings that are being made today, trying to dodge your responsibility, costing the Court additional time and effort by your efforts."[3]

---

[3] Husband was forced to pay $5,200 through involuntary garnishment which the trial court stated "goes to the issue of wilfulness [sic] or wantonness and ability to pay."

B.

Husband filed a motion asking the district court judge to review the magistrate's ruling. On January 5, 1996, the district court judge denied the husband's motion for review, concluding "that the orders of the Magistrate were in accordance with the law and sufficiently supported by the evidence."

Husband next appealed to the court of appeals. The court of appeals affirmed the remedial order but reversed the punitive contempt order. *See Nussbeck*, 949 P.2d at 77. The court of appeals concluded that the magistrate's findings, upheld by the district court judge, in effect, found husband's ability to pay was "related solely to the arrearages accruing since the entry of the 1990 judgment and not to any arrearages upon which [the 1990] judgment was based." *Id.* at 75. The court of appeals further concluded that the wife's punitive contempt motion was "based solely upon . . . [husband's] failure to pay the October 1990 judgment" and was not based on his violation of "some other court order." *Id.* at 76. Therefore, the court of appeals held that failure to pay a money judgment cannot provide the basis for contempt, and that the "resulting order of [punitive] contempt and the punitive sanctions imposed . . . must be reversed." *Id.* at 77. Relying upon *In re Marriage of Woodrum*, 618 P.2d 732 (Colo.App.1980), the court of appeals reversed the trial court's ruling, holding that "[t]he entry of a judgment at law and the prosecution of a . . . contempt citation are alternative, not duplicative, remedies." *Id.* at 76.

We granted certiorari due to the importance of the court of appeals' holding, potentially limiting the ability

of trial courts to enforce orders that result in a judgment in dissolution proceedings. We now reverse.

II.

For purposes of punitive contempt proceedings, a movant must allege and a trial court must find the following: (1) the existence of a lawful order of the court; (2) contemnor's knowledge of the order; (3) contemnor's ability to comply with the order; and (4) contemnor's willful refusal to comply with the order. Before beginning our analysis, we first state certain legal principles that guide our deliberations.

A.

A trial court that acquires jurisdiction in dissolution proceedings has the authority to impose contempt sanctions to enforce obedience of its orders. *See Shapiro v. Shapiro*, 115 Colo. 501, 504, 175 P.2d 387, 389 (1946). Even after entering a decree of dissolution, the court has continuing jurisdiction to enforce its orders, including those directing payments for support of a child and temporary maintenance. *See Gonzales v. District Court*, 629 P.2d 1074, 1075 (Colo.1981).

"The usual method of enforcing an order in a divorce action . . . is by means of commitment for contempt of court after notice to the husband and a demand for payment." *Harvey v. Harvey*, 153 Colo. 15, 17-18, 384 P.2d 265, 266 (1963). "Contempt proceedings are equally available in enforcing a judgment which determines the property rights of the parties in a divorce proceeding." *Id.*

C.R.C.P. 107 provides the authority pursuant to which trial courts are to conduct remedial and punitive contempt proceedings. *See* C.R.C.P. 107. Rule 107 defines contempt as "[d]isorderly or disruptive behavior- . . . toward the court, or . . . disobedience . . . by any person to . . . any lawful . . . order of the court." C.R.C.P. 107(a)(1). Under Rule 107 there are two types of contempt: "direct" and "indirect." "Direct contempt" arises from only extreme or persistent in-court conduct that disrupts court proceedings and which requires a judge to impose order. *See* C.R.C.P. 107(a)(2). Direct contempt may be punished summarily, and a court need only make simple factual findings to support its ruling that a person is guilty of contempt. *See* C.R.C.P. 107(a)(2) and 107(b); *see also In re Marriage of Johnson*, 939 P.2d 479, 481-82 (Colo.App.1997). "Indirect" contempt is contempt that "occurs out of the direct sight or hearing of the court." C.R.C.P. 107(a)(3).

Rule 107 also sets forth two types of sanctions which the trial court can impose: punitive and remedial. *See* C.R.C.P. 107(a)(4) and (a)(5). Remedial sanctions for contempt are "[s]anctions imposed to force compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform." C.R.C.P. 107(a)(5); *see also Harvey*, 153 Colo. at 17-18, 384 P.2d at 266 (quoting 17 Am.Jur. *Divorce and Separation*, §§ 794, 796) ("Where a party is guilty of willful disobedience, or obstinacy to an order of the court, the court is empowered to punish for contempt and sentence [the offending person] to imprisonment until the specified sum or costs are paid."). A person guilty of contempt, therefore, "may be imprisoned until . . . performance" of

the act. C.R.C.P. 107(a)(5); *Murley v. Murley*, 124 Colo. 581, 584, 239 P.2d 706, 708 (1951). C.R.C.P. 107(d)(2) provides that remedial contempt applies only to those who have an ability to pay but refuse to do so. Before imposing remedial contempt the court is required to find "a present ability to pay." C.R.C.P. 107(d)(2).

Punitive sanctions for contempt are sanctions imposed to punish "by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court." C.R.C.P. 107(a)(4). The fixed penalties imposed for punitive contempt make it clear that a contemnor imprisoned after being adjudged to be in punitive contempt is not imprisoned for a debt, which would violate Article II, section 12, of the Colorado Constitution,[4] but, instead, is punished for violating a court order by failing to pay amounts due at a time when the contemnor had the ability to pay. *See Harvey*, 153 Colo. at 18, 384 P.2d at 266. Unlike remedial contempt, which the contemnor may purge by complying with the court order in question, punitive contempt cannot be so purged. Rather, the punishment imposed must be served by the contemnor because he or she has been convicted of a willful violation of a court order. Colorado courts have long held that Article II of our constitution does not prohibit punishment of contempt for refusing to obey lawful orders or

---

[4] Article II, section 12, of the Colorado Constitution provides "no person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law, or in cases . . . where there is a strong presumption of fraud." Colo. Const. art. II, § 12.

decrees one has the ability to meet. *See In re Popejoy*, 26 Colo. 32, 36, 55 P. 1083, 1085 (1899). Imprisonment of husband for contempt in refusing to obey the lawful orders of a court " 'is not imprisonment for a debt, but [for the] refusal to obey the lawful order of the court . . . represented by the judgment in favor of his wife.' " *Harvey*, 153 Colo. at 18, 384 P.2d at 266 (quoting *Popejoy*, 26 Colo. at 37, 55 P. at 1085); *see also Usery v. Fisher*, 565 F.2d 137 (10th Cir.1977).

By its nature, certain procedural requirements must be met before a court can impose punitive sanctions. When it appears to the court, on motion supported by affidavit that indirect contempt has been committed, the court may issue a citation naming the person so charged requiring his appearance to show cause why he should not be punished. *See* C.R.C.P. 107(c). In an indirect punitive contempt proceeding, the court may impose a fine, imprisonment, or both if the court expressly finds that the person's conduct was offensive to the authority and dignity of the court. The contemnor has the right to make a statement in mitigation prior to the imposition of sentence. *See* C.R.C.P. 107(d)(1).

B.

A remedial contempt order exists primarily to enforce obedience to a trial court's order. Therefore, any payments or proceeds resulting from remedial contempt are payable to the person injured by the disobedience to a court's order. *See In re Marriage of Herrera*, 772 P.2d 676,

679 (Colo.App.1989). On the other hand, a punitive contempt order, intended to vindicate and uphold the dignity of the court, is not designed to benefit the interests of a third party; instead, its purpose is to punish the offending party for refusal to obey lawful orders. *See Harvey*, 153 Colo. at 18, 384 P.2d at 266. Plainly and simply, a punitive contempt proceeding is a matter between the court and the offending party. *See id.*

A person who "willfully" violates an order of a court acts voluntarily, knowingly, and with conscious regard for the consequences of his conduct, refusing to comply with court orders when one has the ability to do so. *See Schnier v. District Court*, 696 P.2d 264, 268 (Colo.1985) ("Disobedience or resistance of any lawful writ, process, order, rule, decree, or command" of a court constitutes contempt).

Because a punitive contempt proceeding is, as the name suggests, punitive, a person subject to such proceedings must be given notice of the offending conduct, the likely consequences, and the right to a hearing. *See Dooley v. District Court*, 811 P.2d 809, 811 (Colo.1991). That notice is sufficient, however, where the verified motion or affidavit sets forth the potential sanction of fine or imprisonment. *See id.*

C.

Set against C.R.C.P. 107 and relevant precedent, we must consider section 14-10-122(1)(c), 5 C.R.S. (1998). Section 14-10-122(1)(c) provides that: "[I]n any action or proceeding in any court of this state in which child support, maintenance when combined with child support, or

maintenance is ordered, a payment becomes a final money judgment . . . when it is due and not paid." § 14-10-122(1)(c), 5 C.R.S. (1998).

By operation of law, therefore, when any court-ordered installment of child support is due and unpaid, it automatically becomes a "final money judgment," similar to any other judgment for money, without further resort to the trial court. *See* § 14-10-122(1)(c); *In re Marriage of Jacobs*, 859 P.2d 914, 915 (Colo. 1993); *Burke v. Burke*, 127 Colo. 257, 261, 255 P.2d 740, 742 (1953). Moreover, under section 14-10-122, the "judgment is entitled to full faith and credit and may be enforced in any court of this state or any other state." § 14-10-122(1)(c).

"In order to enforce a support judgment, the obligee shall file with the court that issued the order a verified entry of support judgment specifying the period of time that the support judgment covers and the total amount of the support judgment for that period." § 14-10-122(1)(c). The statute contemplates enforcement of the support judgment before the court that issued the support order. The statute is silent as to other means of enforcement, such as contempt proceedings. The statute does provide, however, for an expedited procedure for enforcement of a support judgment. *See id.*

III.

We now apply the above law to the facts of this case, giving due deference to the findings of the magistrate and trial court below. *See People v. Hampton*, 758 P.2d 1344, 1348 (Colo.1988) (a trial court's factual findings are entitled to deference by a reviewing court and will not be

overturned if supported by competent evidence in the record).

A.

Wife argues that the issue in the contempt proceeding was husband's failure to comply with prior orders of the court, contending in particular that she sought enforcement of the temporary orders directing the payment of $330 per month in maintenance and child support, and not merely to execute upon the 1990 Judgment. Therefore, wife claims, the fact that a written judgment was entered for amounts due and not paid under the temporary orders and the 1990 Judgment entered by operation of law pursuant to section 14-10-122, should not bar punitive contempt proceedings against husband. We agree.

In the record below and before us, husband does not dispute the entry of the 1987 order, the temporary orders, directing payments of $330 per month for maintenance and child support. The 1990 Judgment was rendered *after* the entry of the temporary orders directing husband to pay the very amounts the magistrate found husband "attempt[ed] . . . to dodge." The amounts not paid under the temporary orders later became the basis for the 1990 Judgment in the amount of $13,200, which judgment husband did not appeal. Fifteen months later, after the payments for support and maintenance remained unpaid, wife filed her motion for contempt. We conclude that the temporary orders, even though the basis for a judgment by operation of law, *see* § 14-10-122, continue to provide a sufficient predicate for a contempt citation.

In accordance with section 14-10-122(1)(c), the trial court's temporary orders became a judgment when due and not paid. Any such judgments, rendered automatically upon each date a payment is due and is not paid, are rendered by force of statute upon amounts required by the temporary orders, which directed husband to faithfully make monthly maintenance and child support payments. *See* § 14-10-122(1)(c). While the 1990 Judgment, entered by the court or under section 14-10-122, was correctly characterized by the court of appeals as a "declaration that one party is indebted to another in a specified amount," *Nussbeck*, 949 P.2d at 76, further characterization of the judgment to, in effect, obliterate the temporary orders does not, in our view, do full justice to the trial court's orders underlying the judgment. It is those orders, the temporary orders, entered in 1987 which continued in effect beyond the date judgment was entered, not the 1990 Judgment, which was the predicate for the punitive contempt proceedings and the judgment of contempt now under review.

Husband counters that, consistent with the Colorado Constitution's prohibition against imprisonment for debt, *see* Colo. Const. art. II, § 12, the court of appeals correctly concluded that the 1990 Judgment constitutes an unpaid debt and nothing more. Reasoning further, husband then argues that he therefore cannot be found guilty of punitive contempt for debts covered by the 1990 Judgment. We disagree.

While as a general rule the Colorado Constitution prohibits the imprisonment of a person for debt, one of the noted exceptions to that constitutional mandate is violation of a court order. *See Harvey*, 153 Colo. at 17, 384

P.2d at 266. When imposing punitive contempt the magistrate stated:

> On the punitive portion, you're ordered for 90 days straight time in jail. And that's to vindicate the dignity of . . . the court for your continual obstruction of the order of the court, . . . costing the court additional time and effort by your efforts.

Therefore, contrary to husband's argument, he was not imprisoned for failing to pay a judgment or a debt. Rather, husband is subjected to imprisonment because of his persistent and willful refusal to obey the temporary orders entered under husband's stipulation, which required monthly payments of child support and maintenance to wife of $330. Husband's argument, taken to its full extent, would immunize from contempt proceedings and court orders all those who fail to comply with trial court orders due solely to the automatic entry of judgment by operation of section 14-10-122. Such a result would be absurd and would find no basis in the text or context of the statute.

Husband further argues that he was not provided notice and that "[n]o court ever found that [he] had any ability to pay the 1990 judgment"; therefore, the punitive contempt ruling cannot stand. However, on this record, we are not so persuaded. On July 6, 1995, wife filed her Verified Motion for Punitive Contempt Citation setting forth the necessary elements to satisfy the notice requirements. Those elements were that husband "refused to pay child support," acted in "willful violation of existing orders of the court," and that husband knew that he had the obligation to pay under the temporary orders and the

1990 Judgment. At the November 21, 1995 hearing, the magistrate, taking notice of the court file, found that husband had not complied with the court's prior orders, that husband knew of the prior orders, that husband had the ability to pay, and that those "orders for child support were not paid."[5]

Whatever comfort husband may find in the magistrate's interchangeable use of the terms "orders" and "judgment" is of no legal effect, in our view. Moreover, our reading of the magistrate's findings of November 21, 1995 causes us to conclude that there were findings of husband's ability to make the ordered payments and that husband willfully failed to make such payments in accordance with the temporary orders. The magistrate found as follows:

> Well, the Court finds that as to orders, there were orders. . . . And there was [a] finding, at that time, of the ability to pay. And the Court finds that there were orders. And the Respondent was aware of the orders. And as to those two, he had the ability to comply. That was found at the time that those were entered. . . . As to the punitive, [the] Court finds the same thing. There were orders that were entered. The orders were known to the Respondent. The Respondent appealed those orders on several occasions. And the court takes notice of its own file. . . . [I]n the Court's view, [husband's refusal] goes to the issue of wilfulness [sic] or wantonness and ability to pay. . . . So, there were some payments

---

[5] At the time of the remedial order, the court found that Husband had a present ability to pay $11,753.24 plus $8,000 for the ring.

> that were made. And that does not, in this Court's view, absolve the Respondent of his duty to pay. Court finds that these orders for child support are judgments when they are not paid. And there was nonpayment. And the record of nonpayment is so long, so much a part of the court record, previously addressed in, at least, one contempt citation with review. Respondent had been admonished in the past by this Court, specifically about his behavior and not coming forward with his payments. And the intent of the Court is to get these payments made. . . . And I think you've had ample opportunity to follow through with the orders of the Court. And you haven't done that. And your attempts are, and have been, to dodge the order, to not pay, to make it difficult for the Petitioner to collect child support. And based on those issues, I find that punitive sanction is appropriate.

We agree that the better practice is to set forth findings that more explicitly (1) identify the particular order; (2) describe contemnor's knowledge; (3) state contemnor's ability to pay; and, (4) find contemnor's refusal to pay was willful. However, on this record the magistrate's findings are minimally sufficient to support the ruling imposing punitive contempt sanctions.

Therefore, we conclude that the trial court retained sufficient authority to enforce its child support and maintenance orders. Accordingly, we hold that the trial court could enforce its temporary orders through punitive contempt proceedings, despite the fact that a judgment had entered on amounts due and not paid under such orders. We further hold that the trial court's punitive contempt

orders should be upheld and therefore reverse the judgment of the court of appeals.

IV.

The second question upon which we granted certiorari was whether *In re Marriage of Woodrum*, 618 P.2d 732 (Colo.App.1980), must be overruled. To the extent it conflicts with our judgment today, it is.

The factual predicate in *Woodrum*, however, is different from the case before us. In *Woodrum*, the contempt order of the trial court was for remedial contempt as opposed to punitive contempt. Nonetheless, *Woodrum* states that "entry of a judgment for past due support payment is an exclusive remedy; such judgments and remedial contempt orders are alternative, not cumulative, remedies." *Woodrum*, 618 P.2d at 735. By our judgment today we disapprove of that holding.

The court of appeals, applying this language, erred when it held that the failure to pay a money judgment, entered pursuant to section 14-10-122, bars a court from imposing either remedial or punitive contempt sanctions. While we do not question the conclusion that a money judgment at law is not an order to pay but is simply a declaration that one party is indebted to another in a specified amount, we disagree, however, with the court of appeals' holding that, under these facts, because wife chose to have a judgment at law entered for the arrearages she cannot now seek a contempt order to compel payment. *See Nussbeck*, 949 P.2d at 75, 76. Accordingly, we do not agree with that portion of the court of appeals' opinion.

Such an application of the *Woodrum* opinion would lead to the same absurd result we rejected in husband's argument. We will not immunize individuals who willfully refuse to make child support and maintenance payments ordered by trial courts merely because, by operation of law, the amounts due automatically result in a judgment. *See* § 14-10-122(1)(c). Therefore, we further hold that entry of a judgment pursuant to section 14-10-122(1)(c) for past due support payments ordered by the court will not alter a trial court's authority to enforce its order underlying that judgment through contempt proceedings.

The existence of a judgment is immaterial when viewed in the context of a contempt proceeding arising out of support or maintenance orders. Rather, the focus is whether there was a lawful order of the court, knowledge of the order, an ability to make the payments ordered, and a willful disobedience of that order.

To the extent that *Woodrum* can be read to state otherwise, we disapprove of *Woodrum*.

V.

In sum, we disagree with the court of appeals' conclusion that the entry of the 1990 Judgment bars the trial court from enforcing its underlying temporary orders through punitive contempt proceedings. We hold that the entry of a judgment, by operation of law pursuant to section 14-10-122(1)(c), does not deprive the trial court of its authority to enforce its child support and maintenance orders underlying the judgment.

Accordingly, we reverse the judgment of the court of appeals and remand this case to that court with instructions that it reinstate the trial court's order finding husband in punitive contempt for willfully disobeying an order to pay maintenance and child support, imposing sanctions, and awarding attorney fees.

COLORADO COURT OF APPEALS April 3, 1997
No. 96CA0337

In re the Marriage of

Patricia J. Nussbeck,

Appellee,

and

Robert J. Nussbeck,

Appellant.

Appeal from the District Court of Jefferson County
Honorable Gaspar F. Perricone, Judge
No. 86DR1894

Division II JUDGMENT AFFIRMED IN PART
Opinion by AND REVERSED IN PART
JUDGE CRISWELL
Marquez and Taubman, JJ., concur

Frank McGuane & Associates, P.C., Frank L. McGuane, Jr., Denver, Colorado, for Appellee

Thomas H. May, Denver, Colorado, for Appellant

Robert J. Nussbeck (husband) appeals from two orders finding him in contempt of court and imposing both remedial and punitive sanctions upon him. We affirm the remedial contempt order, but reverse the punitive contempt order.

The dissolution proceedings in which these two contempt orders were entered have a long and unique history. The petition to dissolve this 19-year marriage was

filed in August 1986, by which time one of the parties' two children was already emancipated. By agreement, an order was entered in April 1987 on a temporary basis, directing husband to pay to Patricia J. Nussbeck (wife) the sum of $330 per month as both maintenance and child support, without allocation. The husband failed to pay at least a portion of the amounts required to be paid by this April 1987 order, and in October 1990, a judgment against him for $13,200 was obtained by the wife.

Later, in May 1991, a decree of dissolution entered. At that time, however, the court, noting that the parties' business was subject to federal court bankruptcy proceedings, determined that permanent orders could not then be entered, and it reserved its jurisdiction for the entry of the same at a later time.

Such permanent orders were finally entered, effective March 1994. By that time, interest had increased the amount of the 1990 judgment to some $19,100, not considering payments of some $5,200 that the husband had made.

The March 1994 permanent orders noted that, as of May 1993 (about one year before the hearing), there had been a resolution of the husband's liability for future payments. It also found, however, that, between the entry of the October 1990 judgment and May 1993, the husband had incurred additional arrearages in the amount of some $11,753.24. In addition, it found that the husband had sold a ring that he had given to wife, and it directed that he pay her the sum of $8,000, representing its market value.

With reference to the husband's financial status, it found that he earned $2,000 a month "as a draw" and was provided with automobile and health insurance. Because it determined that the husband had "the ability to borrow money from his brother in order to help his business," the court directed that the husband pay the then recent arrearages of $11,753.24 forthwith and the $8,000 for the ring within 60 days. It emphasized that the husband "does have the ability to pay the arrearages." This finding, however, related solely to the arrearages accruing since the entry of the 1990 judgment and not to any arrearages upon which that judgment was based.

In July 1995, about 15 months after these permanent orders were entered, the wife filed two motions seeking to have the husband held in contempt. One motion was based upon the husband's failure to pay either arrearages or the value of the ring, as directed by the March 1994 permanent orders. In this motion, only remedial sanctions and attorney fees were sought.

The second motion sought punitive sanctions and attorney fees based upon the husband's failure to pay the 1990 judgment.

After a hearing held before a magistrate in November 1995, more than five years after the October 1990 judgment and some 18 months after the entry of the March 1994 permanent orders, the husband was found guilty both of punitive contempt for failing to pay the October 1990 judgment and of remedial contempt for failure to pay the amounts he was ordered to pay by the court's March 1994 permanent orders.

I. The Remedial Contempt Order

The husband asserts that the court's order finding him in contempt for failing to pay the arrearages that accrued between the judgment of October 1990 and May 1993 must be reversed because (1) the trial of the issues relating to this subject in conjunction with the issues raised by the wife's motion for punitive contempt violated his right to due process of law because he was prevented from testifying with respect to the remedial contempt issues for fear of implicating himself upon the subject of the punitive contempt, and (2) the wife failed to prove that he had the ability to comply with the March 1994 permanent orders. We disagree with both contentions.

As a threshold matter, we note that the remedial contempt order required the husband's incarceration until he paid, in full, all of the amounts ordered to be paid by the March 1994 permanent orders. At the beginning of the contempt hearing, the husband announced that he had the funds to pay these amounts. Hence, shortly after his jailing in accordance with the remedial contempt order, he paid all the sums required and was released.

Such payment, however, does not render the husband's appeal of the remedial order moot. This is true because this order was the predicate for the award of attorney fees, and in such cases, compliance with the sanctions imposed does not result in mootness. *Catron v. Catron*, 40 Colo. App. 476, 577 P.2d 322 (1978). Indeed, because a finding of contempt imposes a stigma upon its subject, it is doubtful that such an order can ever be

considered as moot merely as a result of the subject's compliance with that order. *White v. Adamek*, 907 P.2d 735 (Colo. App. 1995).

A.

The husband's claim that he was prejudiced by the joint hearing on both contempt motions is similar to a criminal defendant's assertion that the joinder of two or more counts is prejudicial because of a need not to testify with respect to one of those counts. In such circumstances, in order to obtain a severance of the counts, the defendant must show that he or she has important testimony to give with respect to one count and a strong need to refrain from testifying upon one or more of the others. *People v. Walker*, 189 Colo. 545, 542 P.2d 1283 (1975); *People v. Guffie*, 749 P.2d 976 (Colo. App. 1987).

A similar rule should be applied in punitive contempt proceedings. *See* C.R.C.P. 107(e) (remedial and punitive sanctions may be combined by court).

However, here, the husband made no objection to the joinder of the two motions for hearing before the magistrate who heard the matter, and neither in the trial court nor before us has he made the showing required by *People v. Walker, supra*. Consequently, he has failed to demonstrate any due process violation resulting from the joint hearing.

B.

Likewise, we reject the husband's claim that the evidence was insufficient to support the court's remedial order.

To support a remedial sanction, based upon the violation of a prior court order, it is necessary to establish that the subject had the ability to comply with that order at the time that the order required action. *In re Marriage of Crowley*, 663 P.2d 267 (Colo. App. 1983). In addition, it must also be established that the subject has the present ability to comply with that order, so that he or she may purge the contempt. *In re Marriage of Zebedee*, 778 P.2d 694 (Colo. App. 1988). *See* C.R.C.P. 107(2) (in order to confine for remedial contempt, court must find a present ability to comply).

Here, the order that the husband allegedly violated was the order of March 1994, which directed the husband "forthwith" to pay the arrearages accruing after October 1990. And, contrary to the husband's assertions, that order specifically determined that the husband "does have the ability to pay [those] arrearages." Indeed, it was based upon this finding that the court ordered a forthwith payment of the arrearages and a payment for the ring to be made within 60 days.

In addition, the husband announced at the time of the contempt hearing that he was ready and able to pay the full amount due under the March 1994 permanent orders as of that time.

We conclude, therefore, that the court's order finding that the husband contemptuously failed to comply with

the court's March 1994 order is supported by the evidence. Hence, the order finding him in contempt for failure to pay these amounts, as well as the remedial sanctions imposed, must be affirmed.

II. The Punitive Contempt Order

The husband also argues that the court could not impose punitive sanctions upon him for his failure to pay the October 1990 judgment. We agree.

The wife's second motion and affidavit sought to have the husband held in punitive contempt based solely upon his failure to pay the October 1990 judgment; those moving papers made no reference to the husband's failure to comply with the underlying April 1987 order. Likewise, the magistrate's finding of punitive contempt was founded solely on the husband's failure to pay that judgment and not on his violation of some other court order. We conclude, however, that the failure to pay a money judgment, such as that involved here, cannot provide the basis for the imposition of either remedial or punitive contempt sanctions.

Because the wife chose to have a judgment at law entered for the pre-October 1990 arrearages, she cannot now seek a remedial contempt order to compel their payment. The entry of a judgment at law and the prosecution of a remedial contempt citation are alternative, not duplicative, remedies. *In re Marriage of Woodrum*, 618 P.2d 732 (Colo. App. 1980).

Further, while the division in *Woodrum* suggested, in dictum, that there might be some circumstances in which

punitive contempt sanctions might be imposed after a judgment has entered, we are convinced that, even if this be accurate, such sanctions must be based upon a violation of the underlying order requiring payment and not, as here, upon the failure to pay the judgment.

Colo. Const. art. II, § 12, prohibits any person from being "imprisoned for debt," except in specified circumstances, such as "in cases of tort or where there is a strong presumption of fraud."

The exceptions to the prohibition, however, are not self-executing; they can be implemented only pursuant to legislation adopted by the General Assembly. *Kinsey v. Preeson,* 746 P.2d 542 (Colo. 1987); *Corryell v. Larson,* 25 Colo. App. 432, 139 P. 25 (1914). And, there is no statute decreeing that a judgment at law for arrearages is to be considered a judgment based on tort or one involving fraud.

Of course, the pertinent constitutional provision does not protect a party who willfully violates a court order to pay. Both remedial and punitive sanctions may, in appropriate cases, be imposed upon such a party. *Harvey v. Harvey,* 153 Colo. 15, 384 P.2d 265 (1963).

However, a money judgment at law is not an order to pay; it is simply a declaration that one party is indebted to another in a specified amount, leaving the judgment creditor to pursue the remedies provided by law. *San Luis Power & Water Co. v. Trujillo,* 93 Colo. 385, 26 P.2d 537 (1933). *See In re Marriage of Woodrum, supra.*

To be sure, in the course of execution proceedings upon such a judgment, a court may enter ancillary orders

directing that the judgment debtor take certain actions, including the transfer of property. *See, e.g.*, C.R.C.P. 69(g). A willful failure to comply with such an order could furnish the predicate for the imposition of remedial or punitive sanctions. *Cf. Urbancich v. Mayberry*, 124 Colo. 311, 236 P.2d 535 (1951). However, no such order in aid of execution was entered here.

We conclude, therefore, that, because both the wife's motion and affidavit and the magistrate's finding of contempt relied solely upon the husband's failure to pay the October 1990 judgment as the basis for the punitive contempt sanctions, the resulting order of contempt and the punitive sanctions imposed therefor must be reversed.

The order finding the husband in contempt for violating the March 1994 order and awarding attorney fees relative thereto is affirmed. The order finding the husband in contempt for not paying the 1990 judgment, imposing punitive sanctions imposed upon him, and awarding the wife attorney fees for such failure is reversed.

JUDGE MARQUEZ and JUDGE TAUBMAN, concur

DISTRICT COURT, JEFFERSON COUNTY, COLORADO
Case No. 86 DR 1894, DIVISION 2

ORDER

In re the Marriage of:
PATRICIA J. NUSSBECK, Petitioner
and
ROBERT J. NUSSBECK, Respondent

THIS MATTER was considered by the Court on Respondent's Motion to Review Order of Magistrate respecting certain contempt proceedings held on November 21, 1995. The Court has considered the Motion, the Response filed by the Petitioner, including the legal authorities cited therein, and has reviewed the Transcript of the Magistrate's ruling, which was attached to Petitioner's Response. The Court, now being fully advised in the premises, finds and concludes that the orders of the Magistrate were in accordance with the law and sufficiently supported by the evidence. Accordingly, the Motion should be denied.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Respondent's Motion to Review Order of Magistrate shall be, and the same hereby is, DENIED.

SIGNED IN CHAMBERS, this 5th day of January, 1990.

BY THE COURT:

/s/ Gaspar Perricone
DISTRICT JUDGE

VJS 11/21/95 4:25 PM
Printed Minute Ord District Court, Jefferson County
Status Closed INAC
Case#: 86DR-001894 Nussbeck, Patricia J and Nussbeck, Robert J
DIVISION 2 Domestic Relations – Dissolution of Marriage

FILE DT ENTER DT EVENT/FILING/PROCEEDING

44 11/21/95 11/21/95 Minute Order – Court
JUDGE: JAD CLERK: VJS REPORTER:
PRESENT: ATTY F. MCGUANE APPR W/PETN. ATTY T. MAY APPR W/RESP. CONT'D
CONTEMPT HRG – TESTIMONY TAKEN & STATEMENTS HEARD. CT FINDS REMEDIAL CONTEMPT & PUNITIVE CONTEMPT FOR NON-PAYMENT. COUNSEL TO SUBMIT ATTY FEES AFFI FOR EA CONTEMPT. MR. MAY GIVEN 15 DAYS TO OBJ IN WRITING. REMEDIAL: ORDERED TO JAIL UNTIL $8,000.00 PLUS INTEREST & $11,753.14 PLUS INTEREST IS PAID. PUNITIVE: 90 DAYS STRAIGHT TIME IN JAIL. ATTY MAY REQ STAY OF EXECUTION – ON PUNITIVE GRANTED, ON REMEDIAL DENIED. ATTY MCGUANE TO PREPARE WRITTEN ORDER. RESP PLACED IN CUST OF SHERIFF FOR TRANSPORT TO JAIL. MITT TO ISSUE.
/VJS

******* END OF DATA *******

By the Court

/s/ John A. DeVita II
John A. DeVita II
Magistrate

NOV 22 1995

Supreme Court, U.S.
FILED
JUN 28 1999
CLERK

No. 98-1917

IN THE

Supreme Court of the United States

ROBERT J. NUSSBECK,

Petitioner,

v.

PATRICIA J. NUSSBECK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

FRANK L. MCGUANE, JR.
Counsel of Record
KATHLEEN A. HOGAN
BRENDA L. STOREY
MCGUANE AND HOGAN, LLP
Attorneys for Respondent
720 South Colorado Boulevard
Suite 910-N, The Galleria
Denver, Colorado 80246
(303) 691-9600

153529

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

1SPP

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Opinions Below	1
Statement of The Case	1
Summary of Argument	5
Reasons for Denying the Writ	7
I. The Petition Misstates The Facts And Holdings, Thereby Distorting The Question Presented.	7
A. In light of the fact that the petitioner was ordered imprisoned for his violation of the temporary orders, rather than for his failure to pay a money judgment, his argument based upon improper imprisonment for failure to pay a money judgment is totally inapplicable.	7
B. As the Colorado Supreme Court only overruled the Colorado Court of Appeals' prohibition against cumulative entry of a judgment for past due support and a remedial contempt order, and the petitioner is not claiming that the trial court erred by entry of a remedial contempt order following entry of a judgment for past due support, there is	

Contents

Page

no basis for his argument that his conviction and imprisonment for *punitive* contempt constituted unconstitutional retroactive application of law. 8

C. The facts do not give rise to an argument against retroactive application or interpretation of a criminal statute so as to criminalize conduct retroactively. 9

II. The Record Establishes The Trial Court Made The Requisite Findings Of Petitioner's Ability To Pay When Due And Of His Conduct Offending The Dignity Of The Court. 9

Conclusion 12

TABLE OF CITED AUTHORITIES

Page

Cases:

Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624 (1988) 12

In re Marriage of Woodrum, 618 P.2d 732 (Colo. App. 1980) 5, 6, 7, 8, 9

Lobb v. Hodges, 641 P.2d 310 (Colo. App. 1982) 10, 12

OPINIONS BELOW

The petition accurately reflects the opinions below; however, the opinion of the Colorado Supreme Court is reported at 974 P.2d 493, *In re Marriage of Nussbeck* (Colo. 1999).

STATEMENT OF THE CASE

The petition fails to disclose that at the November 21, 1995 Contempt Hearing, the court made extensive findings, reciting a long history of violations by the petitioner, which went back over a period of more than eight (8) years, and which had resulted in the entry of several arrearage judgments and a prior finding that the petitioner was in contempt of court for not paying court ordered maintenance and support. (Petitioner's Appendix, hereinafter "App.," 16-7). The court then imposed both remedial and punitive sanctions. The remedial sanction was that the petitioner was to be jailed until $8,000, plus another $11,753.24, and accrued interest, was paid. The punitive sanction was a ninety (90) day jail sentence, to vindicate the dignity of the court. (App. 31).

As the petition indicates, the petitioner filed for appeal to the Colorado Court of Appeals, who affirmed the remedial contempt ruling and reversed the District Court on the punitive contempt conviction. The petitioner did nothing further with the affirmance of the remedial contempt ruling.

The respondent did seek review of the punitive contempt by certiorari to the Colorado Supreme Court, who reversed the decision of the Court of Appeals. The Colorado Supreme Court held, in relevant part, as follows:

> Wife argues that the issue in the contempt proceeding was husband's failure to comply with prior orders of the court, contending in particular that she sought enforcement of the temporary orders directing the payment of $330 per month in maintenance and child support, and not merely to execute upon the 1990 Judgment. Therefore, wife claims, the fact that a written judgment was entered for amounts due and not paid under the temporary orders and the 1990 Judgment entered by operation of law pursuant to section 14-10-122, should not bar punitive contempt proceedings against husband. We agree.
>
> In the record below and before us, husband does not dispute the entry of the 1987 order, the temporary orders, directing payments of $330 per month for maintenance and child support. The 1990 Judgment was rendered *after* the entry of the temporary orders directing husband to pay the very amounts the magistrate found husband "attempt[ed] . . . to dodge." The amounts not paid under the temporary orders later became the basis for the 1990 Judgment in the amount of $13,200, which judgment husband did not appeal. Fifteen months later, after the payments for support and maintenance remained unpaid, wife filed her motion for contempt. We conclude that the temporary orders, even though the basis for a judgment by operation of law, *see* §14-10-122, continue to provide a sufficient predicate for a contempt citation.

(App.13; emphasis in original).

The Colorado Supreme Court further held, in relevant part, as follows:

> Husband also argues that he was not provided notice and that "[n]o court ever found that [he] had any ability to pay the 1990 judgment"; therefore, the punitive contempt ruling cannot stand. However, on this record, we are not so persuaded. On July 6, 1995, wife filed her Verified Motion for Punitive Contempt setting forth the necessary elements to satisfy the notice requirements. Those elements were that husband "refused to pay child support," acted in "willful violation of existing orders of the court," and that husband knew that he had the obligation to pay under the temporary orders and the 1990 Judgment. At the November 21, 1995 hearing, the magistrate, taking notice of the court file, found that husband had not complied with the court's prior orders, that husband knew of the prior orders, that husband had the ability to pay, and that those "orders for child support were not paid."
>
> Whatever comfort husband may find in the magistrate's interchangeable use of the terms "orders" and "judgment" is of no legal effect, in our view. Moreover, our reading of the magistrate's findings of November 21, 1995 causes us to conclude that there were findings of husband's ability to make the ordered payments and that husband willfully failed to make such payments in accordance with the temporary orders. The magistrate found as follows:

Well, the Court finds that as to orders, there were orders. . . . And there was [a] finding, at that time, of the ability to pay. And the Court finds that there were orders. And the Respondent was aware of the orders. And as to those two, he had the ability to comply. That was found at the time that those were entered. . . . As to the punitive, [the] Court finds the same thing. There were orders that were entered. The orders were known to the Respondent. The Respondent appealed those orders on several occasions. And the Court takes notice of its own file. . . . [I]n the Court's view, [husband's refusal] goes to the issue of wilfulness [sic] or wantonness and ability to pay. . . . So, there were some payments that were made. And that does not, in this Court's view, absolve the Respondent of his duty to pay. Court finds that these orders for child support are judgments when they are not paid. And there was nonpayment. And the record on nonpayment is so long, so much a part of the court record, previously addressed in, at least, one contempt citation with review. Respondent had been admonished in the past by this Court, specifically about his behavior and not coming forward with his payments. And the intent of the Court is to get these payments made. . . . And

> I think you've had ample opportunity to follow through with the orders of the Court. And you haven't done that. And your attempts are, and have been, to dodge the order, to not pay, to make it difficult for the Petitioner to collect child support. And based on those issues, I find that punitive sanction is appropriate.

(App. 15-7).

The relevant law set forth in the earlier case of *In re Marriage of Woodrum*, 618 P.2d 732, 735 (Colo. App. 1980) was that "entry of a judgment for past due support payments is an exclusive remedy; such judgments and *remedial* contempt orders are alternative, not cumulative, remedies." (Emphasis added). Contrary to the petition, *Woodrum* did *not* hold that "the failure to pay a money judgment cannot provide the basis for the imposition of either remedial or punitive contempt."

SUMMARY OF ARGUMENT

The petitioner's entire argument under the first question presented relies upon the Due Process Clause's prohibition against applying or interpreting a criminal statute in a retroactive manner so as to criminalize conduct retroactively. As a basis for his legal argument, the petitioner argues that he was ordered imprisoned by way of a punitive contempt sanction for failing to pay a money judgment. He further argues in support of his legal argument that the Colorado Court of Appeals, via its opinion in *In re Marriage of Woodrum*, had a longstanding prohibition

against imprisonment for failure to pay a money judgment. The petitioner then argues that the Colorado Supreme Court overruled this longstanding prohibition and, therefore, retroactively criminalized his failure to pay a money judgment.

However, the facts and holdings upon which the petitioner relies in support of his legal argument are misstated, thereby distorting the question presented. Contrary to the assertions of the petitioner, he was not ordered imprisoned by way of punitive contempt for failing to pay a money judgment, but was ordered imprisoned by way of a punitive contempt sanction for his violation of temporary orders, which imprisonment was to vindicate the dignity of the court. Contrary to the assertions of the petitioner, the Colorado Court of Appeals' *In re Marriage of Woodrum* opinion contains no prohibition against imprisonment for failure to pay a money judgment. Since no such alleged longstanding prohibition existed, the Colorado Supreme Court could not and did not overrule such prohibition. Therefore, this case has no facts which give rise to an argument against retroactive application or interpretation of a criminal statute so as to criminalize conduct retroactively.

As such, the actual facts and holdings do not support the first question presented, nor the argument underlying same.

The record establishes that the trial court made sufficient findings of the petitioner's ability to pay the court ordered support when due. It also establishes that the trial court made an explicit finding that the petitioner's conduct offended the dignity of the court. Therefore, the record,

itself, disproves petitioner's argument under his second question presented.

REASONS FOR DENYING THE WRIT

I. THE PETITION MISSTATES THE FACTS AND HOLDINGS, THEREBY DISTORTING THE QUESTION PRESENTED.

A. In light of the fact that the petitioner was ordered imprisoned for his violation of the temporary orders, rather than for his failure to pay a money judgment, his argument based upon improper imprisonment for failure to pay a money judgment is totally inapplicable.

As the Colorado Supreme Court noted, "It is those orders, the temporary orders, entered in 1987 which continued in effect beyond the date judgment was entered, *not the 1990 Judgment*, which was the predicate for the punitive contempt proceedings and the judgment of contempt now under review." (App. 14; emphasis added). Thus, the petitioner was not, as he alleges, ordered imprisoned for failure to pay a money judgment. Therefore, his argument based on this improper predicate is inapplicable to the actual facts presented.

Instead, as established by Appendix 14, the petitioner was ordered imprisoned for his violation of the temporary orders, which imprisonment was to vindicate the dignity of the court. This very imprisonment is *permitted* by the case to which petitioner cites. *See In re Marriage of Woodrum*, 618 P.2d 732, 735-36 (Colo. App. 1980).

B. As the Colorado Supreme Court only overruled the Colorado Court of Appeals' prohibition against cumulative entry of a judgment for past due support and a remedial contempt order, and the petitioner is not claiming that the trial court erred by entry of a remedial contempt order following entry of a judgment for past due support, there is no basis for his argument that his conviction and imprisonment for *punitive* contempt constituted unconstitutional retroactive application of law.

The thrust of petitioner's argument is that the Colorado Supreme Court overruled the Colorado Court of Appeals' longstanding prohibition, reflected within *In re Marriage of Woodrum*, against the imprisonment of a party for failure to pay a money judgment. However, *Woodrum* never so held, as reflected within the *Woodrum* reported opinion at 618 P.2d 732, 735-36 (Colo. App. 1980). Therefore, the petitioner's argument based on this improper predicate is inapplicable to the actual facts presented.

The longstanding prohibition reflected within *Woodrum*, and overruled by the Colorado Supreme Court, was against cumulative entry of a judgment for past due support payments and entry of a *remedial* contempt order. (App. 18-9); *In re Marriage of Woodrum*, 618 P.2d 732, 735 (Colo. App. 1980) (holding "entry of a judgment for past due support payments is an exclusive remedy; such judgments and *remedial* contempt orders are alternative, not cumulative, remedies."). However, the petitioner is not, via his current Petition for Writ of Certiorari, challenging the entry of a remedial contempt order following entry of a judgment, nor can he. The Colorado Court of Appeals affirmed the remedial contempt ruling (App. 27-9) and the

petitioner did nothing further with the affirmance. As such, he failed to exhaust his state remedies.

C. The facts do not give rise to an argument against retroactive application or interpretation of a criminal statute so as to criminalize conduct retroactively.

Throughout his petition, the petitioner cites cases prohibiting *ex post facto* laws. However, for such cases to apply, the facts must establish that retroactive application or interpretation of a criminal statute resulted in criminalizing petitioner's conduct retroactively. Because the petitioner was ordered incarcerated via a punitive contempt sanction for his violation of temporary orders, which imprisonment was to vindicate the dignity of the court, and because such imprisonment is consistent with the "longstanding" holdings reflected in *In re Marriage of Woodrum*, there are no facts which give rise to petitioner's argument against *ex post facto* laws. As such, the respondent cannot "rebut" or argue against inapplicable case law.

II. THE RECORD ESTABLISHES THE TRIAL COURT MADE THE REQUISITE FINDINGS OF PETITIONER'S ABILITY TO PAY WHEN DUE AND OF HIS CONDUCT OFFENDING THE DIGNITY OF THE COURT.

In support of his first question presented, the petitioner relies heavily upon *In re Marriage of Woodrum*, 618 P.2d 732 (Colo. App. 1980). Said case affirms "[t]he power of the trial court to punish the husband for violating its order by a penal contempt sentence, imposed to vindicate the dignity of the court." *Id.* at 735. In the case *sub judice*, the

Colorado Supreme Court simply affirmed the trial court's use of its power to punish the petitioner for violating the temporary orders by a penal contempt sentence, imposed "to vindicate the dignity of . . . the court for [his] continual obstruction of the orders of the court." (App. 15).

The petition alleges that there was no evidence of petitioner's ability to pay the support payments when due under the orders. The same argument was advanced by the petitioner before the Colorado Supreme Court. (App. 15). However, as noted by the Supreme Court, there was sufficient evidence of the petitioner's ability to make the payments when due, to wit:

> Well, the Court finds that as to orders, there were orders. . . . *And there was [a] finding, at that time, of the ability to pay.* And the Court finds that there were orders. And the Respondent was aware of the orders. *And as to those two, he had the ability to comply. That was found at the time that those were entered.* . . . And the Court takes notice of its own file. . . .

(App. 15-7; emphasis added).

The petition points out that a prerequisite to punitive contempt is "an explicit finding by the trial court that the contemnor's conduct offends the dignity of the court." (Petition p.14 (*citing Lobb v. Hodges*, 641 P.2d 310, 311 (Colo. App. 1982))). The trial court clearly satisfied this prerequisite, as established by the following findings recited by the Colorado Supreme Court:

> On the punitive portion, you're ordered for 90 days straight time in jail. And that's to vindicate

the dignity of . . . the court for your continual obstruction of the orders of the court, . . . costing the court additional time and effort by your efforts.

. . .

Well, the Court finds that as to orders, there were orders. . . . And there was [a] finding, at that time, of the ability to pay. And the Court finds that there were orders. And the Respondent was aware of the orders. And as to those two, he had the ability to comply. That was found at the time that those were entered. . . . As to the punitive, [the] Court finds the same thing. There were orders that were entered. The orders were known to the Respondent. The Respondent appealed those orders on several occasions. And the Court takes notice of its own file. . . . [I]n the Court's view, [husband's refusal] goes to the issue of wilfulness [sic] or wantonness and ability to pay. . . . So, there were some payments that were made. And that does not, in this Court's view, absolve the Respondent of his duty to pay. Court finds that these orders for child support are judgments when they are not paid. And there was nonpayment. And the record on nonpayment is so long, so much a part of the court record, previously addressed in, at least, one contempt citation with review. Respondent had been admonished in the past by this Court, specifically about his behavior and not coming forward with his payments. And the intent of the Court is to get these payments made. . . . And I think you've

> had ample opportunity to follow through with the orders of the Court. And you haven't done that. And your attempts are, and have been, to dodge the order, to not pay, to make it difficult for the Petitioner to collect child support. And based on those issues, I find that punitive sanction is appropriate.

(App. 15-17). Such noted behavior of the petitioner amounts to much more than "the mere existence of an unpaid judgment," as alleged by the petitioner. Such also satisfies the case law prerequisites espoused by petitioner, to wit: Punitive contempt was not merely presumed and the contemnor's conduct was explicitly found to offend the dignity of the court. (Petition p.14 (*citing Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624 (1988); *Lobb v. Hodges*, 641 P.2d 310, 311 (Colo. App. 1982))).

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

FRANK L. MCGUANE, JR.
Counsel of Record
KATHLEEN A. HOGAN
BRENDA L. STOREY
MCGUANE AND HOGAN, LLP
Attorneys for Respondent
720 South Colorado Boulevard
Suite 910-N, The Galleria
Denver, Colorado 80246
(303) 691-9600